

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 360 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
Nos. 1, 3 to 5 No. No.2 Yes.

PURSHOTTAM KARSONBHAI SOCJITRA

Versus

AMRELI JILLA PANCHAYAT

Appearance:

MS VP SHAH FOR MS KJ BRAHMBHATT for Apellant.

M/S PURNANAND & CO for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 24/04/98

ORAL JUDGEMENT

This is plaintiff's Second Appeal.

The plaintiff-appellant filed suit for quashing seniority list for setting aside an order of his reversion to the post of Tracer and for permanent injunction restraining the defendants-respondents from

reverting him from the post of Draftsman to the post of Tracer.

The plaintiff-appellant was appointed as Tracer with effect from 5.9.1964. From the post of Tracer the next promotional avenue is of Assistant Draftsman and then to the post of Draftsman. The recruitment to the post of Draftsman is made by promotion as well as by direct recruitment under the existing rules. By an order dated 29.5.1970, exhibit 39 the appellant was appointed as Draftsman on temporary basis. He worked as Draftsman though not continuously till the impugned order exhibit 43 was passed on 31.8.1975. It is this order which was challenged in suit. His main contention is that he could not be reverted two steps down and if at all he was required to be reverted consequent upon closure of one of the departments he should have been reverted to the post of Assistant Draftsman whereas he has been reverted to the lowest post of Tracer. It was further his case that before passing the impugned order no opportunity of hearing was given to him and that the impugned order was passed ignoring seniority list and in view of long service of the appellant he was entitled to seniority not at the bottom, hence also the order of reversion is bad in law.

All these allegations were denied in the written statement filed by the defendants. Both the Courts below found that the order of reversion was legal and in accordance with rules and the appellant was not entitled to any opportunity of hearing before this order was passed. Consequently the suit was dismissed, so also the First Appeal. It is, therefore, this Second Appeal.

Following substantial questions of law were formulated in this Appeal.

[1] Whether the impugned order of reversion being passed without affording any opportunity of being heard and hence being passed in violation of principles of natural justice is illegal, invalid, ultravires, arbitrary and void.

[2] Whether the order of reversion during the pendency of statutory appeal before the Competent Authority against the seniority list filed by the plaintiff is illegal and whether the order of reversion can be made against the plaintiff on the basis of the said seniority list under

challenge in appeal under the relevant Panchayat Rules.

[3] Whether the Civil Court can not decide the dispute arising from the challenge to the seniority list when the appeal against the seniority list is pending before the Competent Authority.

[4] Whether the Civil Court has erred in the interpretation of the orders Exh. 39, 41, 46 and 43 in not holding that the plaintiff who has not been continued on the post of Draftsman cannot be reverted to the post of Tracer which was two steps down.

[5] Whether the lower Appellate Court has materially erred in law in not holding that the impugned order of reversion is ultra vires, illegal, arbitrary and in violation of Article 14 and 16 of the Constitution of India.

No one appeared from the side of the respondent at the time of hearing of this appeal, hence learned Counsel for the appellant was heard and the record was examined. After examining record I find that concurrent finding was recorded by the two Courts below which does not suffer from any illegality or infirmity. The two Courts below have rightly held that the seniority list could not be challenged without impleading affected persons viz. Shree C.R.Bhesania and Shree B.P.Makwana. The view taken by the lower Appellate Court on this point that in the absence of impleading these persons as defendants in the suit, the seniority list which affected their subsisting rights could not be set aside is correct. Thus, relief against the seniority list was rightly refused by the two Courts below.

Coming to the impugned order of reversion contained at exhibit 43 it may be stated that opportunity of hearing is to be afforded when reversion order is passed by way of punishment in some departmental proceedings. It is not the case of the appellant that in some departmental proceeding order of reversion was passed by way of punishment. Consequently no opportunity of hearing was required to be given to the appellant.

The appellant further challenged the reversion order being malafide. The lower Appellate Court has

categorically observed that there is no evidence on record to prove malafide on the part of the authorities while passing reversion order. Likewise the reversion order was challenged on the ground that it was passed with a view to harass and harm the appellant. On this point also there is concluded finding of fact that there is no evidence to prove that the impugned order was passed with a view to harass or harm the appellant.

Another ground of attack during the course of argument was that there was existing post of Assistant Draftsman on the date of the impugned order, hence the appellant should have been reverted to that post and not to the post of Tracer which is lower to the post of Assistant Draftsman. On this point the finding recorded by the lower Appellate Court was argued to be incorrect. The lower Appellate Court from the evidence of Valkubhai held that the post of Assistant Draftsman was also abolished with effect from 31.8.1975 consequent upon the closure of Irrigation Department. Valkubhai was Senior Clerk in Public Works Department of the respondent panchayat. According to his statement, which was worth believable, there was no post of Assistant Draftsman on the relevant date in Amreli division. This finding was assailed on the strength of the order dated 6.10.1982 whose translation has been filed in the Second Appeal. It may be mentioned that this document could not be filed in the first Appellate Court or in the Trial Court because it was dated 6.10.1982 whereas the First Appeal was decided on 15.9.1980. Even in this appeal this document was not filed as original document with permission as provided under Order 41 Rule 27 of the Code of Civil Procedure. Consequently translation or true copy filed during the course of argument in Second Appeal without compliance of Order 41 Rule 27 of Civil Procedure Code does not help the appellant in getting this document admitted as of right. Even if in the interest of justice this document is read in evidence at a very late stage in Second Appeal it is subsequent document dated 6.10.1982 much after the disposal of the First Appeal on 15.9.1980. The recital in this document that one post of Assistant Draftsman in the Building Department is vacant since long is vague. The period since when this post was lying vacant is not disclosed in this document. Consequently it cannot be held on the basis of this document that one post of Assistant Draftsman was available as vacant when the First Appeal was decided.

Learned Counsel for the appellant further argued that this document dated 6.10.1982 shows that the post of Assistant Draftsman was vacant and with a view to oblige

Shree D.B.Pandya, Tracer that he was promoted as Assistant Draftsman and the appellant was excluded from consideration for promotion. This attack cannot be sustained in this Appeal and if the appellant feels that this subsequent order dated 6.10.1982 is malicious or invalid he can challenge it in a subsequent suit and not in this appeal. Thus, it is clear that when the First Appeal was decided no post of Assistant Draftsman was vacant on which appellant could be reverted. The order under challenge therefore cannot successfully be attacked on this ground.

Next attack in the course of argument has been that since the lien of the appellant to the post of Tracer was terminated, he could not be reverted to the said post of Tracer. This attack is also misconceived. The appellant was appointed as Draftsman on temporary basis vide order dated 29.5.1970, exhibit 39. In para 3 of this order, it was mentioned that the aforesaid appointment being only on the temporary basis, when the occasion for the reversion arise he would be sent back to his original post without assigning any reason. It is thus manifest from para 3 of the appointment order in favour of the appellant that his appointment to the post of Draftsman was purely temporary and when occasion for his reversion arise he would be sent back to his original post without assigning any reason. Thus, in view of this the appellant could not claim opportunity of hearing before he was reverted. The occasion for appellant's reversion arose because the irrigation department of the panchayat was closed down and as a consequence of closure of irrigation department certain adjustments to the existing employees were required to be made as of necessity. The contention that lien was terminated is falsified from Exh.40 which is order dated 28.1.1973 modifying in part the appointment order dated 29.5.1970 of the appellant as Draftsman. It is mentioned in this order that the lien as Tracer of the appellant Draftsman is suspended from the date he joined as Draftsman. Thus, from this amended order it is clear that the lien of the appellant was not terminated rather his lien to the post was suspended during the period he remained appointed as Draftsman. If the lien was suspended then he can legally be reverted to his original post of Tracer as is clearly mentioned in para 3 of appointment order Exh.39. If a person is promoted on temporary basis with clear direction that he can be reverted to the original post without assigning any reason he cannot complain that the order is invalid, arbitrary or against the principles of natural justice. The principles of natural justice viz. affording an opportunity of hearing could be attracted

only when the appointment order was unconditional or when reversion order was passed by way of punishment. In the case under consideration the impugned order was not passed either by way of punishment nor it was unconditional order. The conditional order of reversion would automatically come into operation when the occasion of reversion arose and as mentioned earlier the occasion for reversion arose because closure of irrigation department.

It is clear from the material on record that the appellant did not possess requisite qualification for being appointed as Draftsman. It is difficult to accept the case of the appellant that by virtue of order exhibit 39 he was directly appointed to the post of Draftsman. On the other hand he was appointed to the post of Draftsman with a view to oblige him ignoring the requisite qualification for the post. This discrepancy came to the knowledge of the authorities. Further attempt was made to oblige the appellant as is evident from exhibit 41 dated 23.4.1974. Mere request was made that because the appellant did not possess requisite qualification for the post of Draftsman, hence, he can be given promotion as Assistant Draftsman. There was further attempt to oblige the appellant by stating that if the post of Assistant Draftsman is not vacant then the post of Draftsman may be down graded and promotion may be given to the appellant with effect from 1.5.1974. Promotion to the post of Assistant Draftsman could be given only when such post was existing. As is evident from exhibit 41 no such post was existing and peculiar suggestion of down grading the post of Draftsman to the post of Assistant Draftsman was made with a view to oblige the appellant. Higher post cannot be down graded to the lower post especially when no such lower post was in existence. Thus, the appellant was obliged and he was given appointment as Assistant Draftsman.

Exhibit 45 dated 30.4.1974 clearly indicates that the appointment of the appellant to the post of Draftsman was not in consonance with the recruitment rules of the panchayat and his appointment as Draftsman between 1.6.1970 to 30.4.1974 was not approved. He was further appointed as Assistant Draftsman with effect from 1.5.1974. Curiously enough the appellant was appointed as Assistant Draftsman though post was not vacant which is clear from exhibit 45. In spite of this favour and obligation showered upon the appellant he had courage to challenge the order of his reversion.

By order dated 26.2.1975, exhibit 46 the

appellant was again appointed by promotion on the vacant post of Draftsman but this promotion and appointment was on purely temporary basis and it was clarified and specified that he could be reverted to his original post of Assistant Draftsman without assigning any reason if there was occasion for the reversion and that the appellant could not raise any objection to that and on that condition he was given promotion as Draftsman. In spite of this recital it is surprising how the appellant can say that he was continuously working as Draftsman right from the date of his initial appointment through order exhibit 41. It is again curious to note that in spite of the condition imposed in exhibit 46 that the appellant can be reverted to his original post of Assistant Draftsman without assigning any reason he can be heard complaining that he was not afforded opportunity of hearing. There was further rider that the appellant could not raise any objection to his reversion to the post of Assistant Draftsman.

Coming to the impugned order contained in exhibit 43 dated 31.8.1975 I find that because the irrigation department was closed with effect from 31.8.1975 that certain consequential arrangements were required to be made. As such Shree B.P.Makwana of irrigation department who was senior to the appellant was transferred as Draftsman in R & B Department. The appellant consequent upon his temporary promotion to the post of Draftsman in the building department could not challenge this consequential arrangement of Shree B.P.Makwana who was senior to him. Consequent upon the transfer of Shree B.P.Makwana as Draftsman to the R & B Department the appellant was transferred as Assistant Draftsman vice Shree B.P.Makwana, Assistant Draftsman, Irrigation Department. Since the Irrigation Department was closed Shree B.P.Makwana who was Assistant Draftsman in Irrigation Department was reverted as Tracer and appointed on the vacant post of Tracer in the Office of Deputy Engineer, Panchayat Peta Department, Amreli. Consequent thereupon the Assistant Draftsman in Irrigation Department after reversion was given appointment on the vacant post of Tracer. It is therefore clear from the above analysis that these orders were consequential orders because of closure of Irrigation Department and learned Counsel of the Appellant could not show from any evidence that the post of Assistant Draftsman in Building Department was available even though his senior Shree B.P.Makwana was transferred and posted as such in this department. Since the lien of the appellant to his original post of Tracer was suspended it stood revived the moment he was reverted

to his original post of Tracer. It is therefore difficult to accept the attack to the order exhibit 43 that by this order two reversion orders were passed against the appellant. As a matter of fact, it was not a straight way reversion to the original post of Tracer rather consequential effect of closure of Irrigation Department and absorption of existing employees. The Civil Court will not interfere in such consequential orders passed by the authorities, nor the First Appellate Court. The High Court will also not in Second Appeal disturb or set aside such order which was passed within competence of the Competent Authority. This order does not suffer from any vice of malafide or arbitrariness nor it reflects that it was passed with a view to harass and cause harm to the appellant. The impugned order was therefore rightly held by the two Courts to be valid.

Coming to the substantial questions, substantial question no.1 is answered in negative for the reasons given in foregoing portion of this judgment. The second question was not pressed in the course of arguments. It may however be mentioned that even if an appeal against the seniority list has been filed by the plaintiff-appellant and is pending, the pendency of that appeal before the Competent Authority will not invalidate the order of reversion. The plaintiff was not reverted on the basis of seniority alone but because he never put in continuous service as Draftsman and his services as Draftsman were on purely temporary basis and he had no right to that post. Consequently the second substantial question has no force and it cannot invalidate the order of reversion passed against the appellant.

The third substantial question has also no substance. However, the Court can incidentally look into the question whether the reversion order was passed on the strength of seniority list or not. The lower Appellate Court found that the appellant did not put continuous service as Draftsman hence, he did not acquire the desired seniority. This incidental observation of the Civil Court cannot be said to be without jurisdiction, hence this substantial question has also no force.

The fourth substantial question is answered in negative so also the fifth substantial question.

In the result, I do not find any merit in this appeal and the same is accordingly dismissed. Since no one appeared from the side of the respondent the appellant shall bear his own costs of this appeal.

Sd/-
(D.C.Srivastava, J)

m.m.bhatt